82-149

Office - Supreme Court, U.S.
FILED
OCT 20 1982
ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM _____

BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

MICHAEL A. LILLY
Assistant Attorney General
Hawaii State Capitol
415 So. Beretania Street
Honolulu, HI 96813
Tel: (808)548-4740
Counsel of Record

DWIGHT K. NADAMOTO
Deputy Attorney General
Dept. of Labor & Industrial Relations
825 Mililani Street, Room 301
Honolulu, HI 96813
Tel: (808)548-4372
Attorney for Appellee Agsalud

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
QUESTION PRESENTED	2
STATEMENT OF CASE	2
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	PAGE
A. G. Bliss Co. v. United Carr Fastener Co., 213 F.2d 541 (1st Cir. 1954)	5
Blount v. Peerless Chemicals (P.R.), Inc., 316 F.2d 695 (2d Cir. 1963)	5
International Shoe Company v. Washington, 326 U.S. 310 (1945).	5
Miller Brothers Co. v. Maryland, 347 U.S. 340 (1953)	6, 7
Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940)	6, 7

STATUTES

H.R.S. Section 383-2(c) 2

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM _____

BLACK CONSTRUCTION CORPORATION, Appellant

v.

JOSHUA C. AGSALUD, DIRECTOR OF THE DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, STATE OF HAWAII; AMADO E. ROSALES and ROGER WIDDIFIELD, Appellees

---

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

The Appellee Joshua C. Agsalud, Director, Department of Labor and Industrial Relations, State of Hawaii, respectfully moves to dismiss or affirm the judgment of the Supreme Court of Hawaii on the grounds that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

The Jurisdictional Statement filed by Appellant has set forth the statute, and constitutional provision involved. Those matters need not be repeated here.

QUESTION PRESENTED

Whether Hawaii's rather than Nevada's collection of unemployment insurance contributions from Black Construction pursuant to section 383-2(c), H.R.S., violates Black Construction Corporation's due process guarantee under the federal constitution.

STATEMENT OF THE CASE

Black Construction Corporation (hereinafter "Black") is incorporated in the state of Nevada. Black's activities, however, in Nevada are limited to the filing of statutorily required reports and the appointment of an agent through whom service of process may be made.

Black is the wholly owned subsidiary of E.E. Black, Ltd. E.E. Black is a Hawaii corporation.

Black has eight officers, several of whom are also officers of E.E. Black, Ltd. Of these eight, Black's President, two Vice-Presidents, and Treasurer reside in Honolulu. The salaries of seven of these eight officers are paid by E.E. Black, Ltd.

The corporate policies of Black are established in Honolulu by E.E. Black, Ltd. These include financial policies, reporting policies, engineering policies and procedures, and contract policies.

Amado Rosales and Roger Widdifield, two former employees of Black, filed unemployment compensation claims in Hawaii. Benefits were paid to Mr. Rosales and Mr. Widdifield.

Over eight months after Mr. Rosales filed his initial claim for unemployment benefits in Hawaii, Black requested forms from the state of Nevada for electing coverage under Nevada's unemployment insurance laws. Black commenced payment to Nevada on December 24, 1975 of unemployment insurance taxes.

The Unemployment Insurance Division, Department of Labor and Industrial Relations, State of Hawaii, on November 26, 1975 determined that all U.S. citizen-employees of Black in employment were covered under the Hawaii Employment Security Law.

Black subsequently unsuccessfully appealed this determination to the Referee for Employment Security Appeals. Further unsuccessful appeals followed to the First Circuit Court and Hawaii Supreme Court.

ARGUMENT

Appellant disputes the ruling of the Supreme Court of Hawaii that the State of Hawaii's assessment of Black Construction for unemployment insurance taxes did not violate the due process guarantee of the federal constitution. Appellant cites authority defining the constitutional limits of a state's exercise of *in personam* jurisdiction.[1/]

It is well established, however, that a state's power to tax and its power to exercise in personam jurisdiction are two different creatures, each with its own test.

1/ The following cases cited by Appellant are *in personam* cases: A.G. Bliss Co. v. United Carr Fastener Co., 213 F.2d 541 (1st Cir. 1954); Blount v. Peerless Chemicals (P.R.), Inc., 316 F.2d 695 (2d Cir. 1963); International Shoe Company v. Washington, 326 U.S. 310 (1945).

In two seminal opinions, Wisconsin v. J.C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940), and Miller Brothers Co. v. Maryland, 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954), this Court set forth the test to be applied in adjudging the constitutionality from a due process standpoint of a state's taxation of nonresidents.

In Wisconsin, supra at 444, this Court stated:

> (The sole constitutional test) for a case like the present one ... is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return. (Emphasis added.)

This Court in Miller Brothers Co., supra at 344-345 also stated:

> [T]he course of decision does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax. (Emphasis added.)

Wisconsin v. J.C. Penney, 311 U.S. 435 (1940) and Miller Brothers Co. v. Maryland, 347 U.S. 340 (1954) then require some "nexus" between a state and that which it seeks to tax. Thus, in the instant case, for Hawaii to collect Black's unemployment insurance contribution, some "nexus" between Black and Hawaii must exist.

Furthermore, it should be noted that Black does not deny liability for unemployment insurance taxes. It asserts,

however, that Nevada is the proper forum to collect them.

Thus, the question is whether under the due process guarantee of the federal constitution Hawaii rather than Nevada may collect Black's unemployment insurance taxes.

Black's "nexus" with Nevada is based upon its incorporation within that state. Its activities although legal may be characterized as more fictional than factual. They are limited to the filing of statutorily mandated reports and the appointment of an agent through whom service of process may be made.

By contrast Hawaii's "nexus" with Black is more factual. It consists of the following:

(1) Black's President, Treasurer, and two Vice-Presidents reside in Hawaii.

Hawaii provides them with the protection and benefits of residency. Hawaii provides Black with the opportunity of residency for its principal employees.

(2) Black's parent company, which pays the salaries of nearly all of Black's officers, is incorporated in Hawaii. Hawaii provides it with the protection, opportunity and benefits of such incorporation.

(3) The forum from which Black establishes its corporate policies is in Hawaii. It is Hawaii which provides Black with the opportunity to establish that forum, and which protects that forum.

(4) Two former employees of Black have filed in Hawaii for unemployment benefits. It is the responsiblity of Hawaii to provide for these workers; it is

Hawaii which provides Black with the benefits attendant therewith.

Hawaii's ties with Black, then, are more significant than Nevada's. Hawaii is the proper forum to enforce Black's obligation for unemployment insurance taxes. Nevada, in fact, has specifically indicated that it has no objection to Hawaii's enforcement of the obligation.

Clearly, then, in light of Black's admitted liability for unemployment insurance taxes and Hawaii's more significant contacts with Black than Nevada, it does not violate Black's due process guarantee to have Hawaii collect its taxes.

CONCLUSION

Wherefore, Appellee respectfully submits that the question upon which this

cause depends is so unsubstantial as to not need further argument, and Appellee respectfully moves the Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Hawaii.

DATED: Honolulu, Hawaii, October 8, 1982.

Respectfully submitted,

MICHAEL A. LILLY
Assistant Attorney General
Hawaii State Caitol
415 So. Beretania Street
Honolulu, HI 96813
Tel: (808)548-4740
Counsel of Record

DWIGHT K. NADAMOTO
Deputy Attorney General

Attorneys for Appellee Joshua C. Agsalud, Director of the Department of Labor & Industrial Relations, State of Hawaii